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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Marriage of YVONNE YINGFAN YIU and DAVID TAK WAI LIU.	B293754 Los Angeles County Super. Ct. No. BD608297
YVONNE YINGFAN YIU, Respondent, v. DAVID TAK WAI LIU, Appellant.	

APPEAL from an order and a judgment of the Superior Court of Los Angeles County, Michael J. Convey, Judge. Affirmed in part, and reversed in part with directions.

Law Offices of Paula S. Glickstein and Paula S. Glickstein for Appellant.

Yvonne Yingfan Yiu, in pro. per., for Respondent.

INTRODUCTION

David Tak Wai Liu appeals from portions of a judgment on reserved issues following the dissolution of his marriage to Yvonne Yingfan Yiu.[1] He challenges the trial court's (1) award of attorney fees to Yvonne under section 1101, subdivision (g) of the Family Code[2] (1101(g)), (2) valuation of securities it found Yvonne transferred in breach of her fiduciary duty under that same statute, (3) summary denial of his request for sanctions under section 2107, subdivision (c), and (4) characterization of certain assets as Yvonne's separate property.

We conclude the trial court erred in its interpretation of sections 1101 and 2107. We therefore reverse the court's judgment on the first three issues David challenges and remand the matter to the trial court for further proceedings on issues two and three. We find no error in the trial court's characterization of Yvonne's separate property and affirm that portion of the judgment.

BACKGROUND

Consistent with our standard of review, we state the relevant facts in the light most favorable to the judgment. (*B.B. v. County of Los Angeles* (2018) 25 Cal.App.5th 115, 120.) We include additional facts relevant to specific issues in the Discussion section.

Yvonne and David were married on July 18, 1998. They both are highly educated with business and financial experience. Yvonne has an MBA and is a licensed securities broker-dealer

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[1] For clarity, we will refer to the parties and witnesses by their first names as the trial court and parties did. We intend no disrespect to the parties or witnesses by doing so.

[2] Undesignated statutory references are to the Family Code.

and financial advisor. She worked for various companies during the marriage and started three related investment companies with two partners, collectively known as Key West. She also has worked as a securities arbitrator and as an expert witness for the securities industry.

David also has an MBA, as well as an MS in civil engineering. He is a registered civil and geotechnical engineer. He started a company in 1993 that he owned with two partners until 2004 when they terminated his partnership and the company filed for bankruptcy. David also worked for Key West, until shortly before the couple separated, after buying out Yvonne's partners at her request. He obtained several financial licenses during that time.

During their marriage, the parties each had financial accounts they held in their own names, as well as joint accounts. David paid the family's expenses. He did not have access to the financial accounts in Yvonne's name.

After more than 16 years of marriage, the parties separated. Yvonne filed a petition for divorce on September 17, 2014—the stipulated date of separation. The court entered a bifurcated judgment as to dissolution of status in late September 2017 and reserved all other issues. Two months later, the parties stipulated to the division of some community assets and the confirmation of some separate property. The court tried the parties' remaining disputed issues over several days in December 2017.

During the divorce proceedings, David learned Yvonne and her mother Herminia Hu held joint title to several financial accounts worth about $1 million at the time of the couple's

separation.[3] Yvonne did not mention those accounts in her preliminary declaration of disclosure filed in December 2014, but disclosed them during discovery.

David also learned Yvonne formed three investment companies with her business partner Jin "Tony" Zeng[4] after the couple separated: Hellman Investment LLC (Hellman LLC), Citizens Group LLC (Citizens Group), and Richman Investments, L.P. (Richman). The companies were formed to develop the Hellman project—a "medical condo development project" to be financed in part with money borrowed from "EB-5 investors" and a bank.[5] Hellman LLC's sole asset was real property, known as the Hellman property, purchased partly with funds from Yvonne and one of the joint Yvonne/Herminia accounts. Yvonne produced documents in discovery concerning her purchase of the Hellman property. In her final declaration of disclosure filed late 2016, Yvonne disclosed her 50 percent ownership interest in Hellman LLC, but not in the other companies. Yvonne testified

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[3] We refer to those accounts as the joint Yvonne/Herminia accounts or joint accounts.

[4] Yvonne and Tony also formed The One Investments LLC (One Investments) with a third partner in December 2015.

[5] The federal EB-5 immigrant investor program permits foreign investors to obtain a green card (permanent resident status) through capital investment in a new commercial enterprise in the United States that creates jobs. (8 U.S.C. § 1153(b)(5); 8 C.F.R. § 204.6 (2020); see USCIS Policy Manual, vol. 6, pt. G, ch. 1, secs. (A)-(B) <https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-1> [as of July 13, 2020], archived at <https://perma.cc/B78Z-7W2K>.) Yvonne testified Hellman LLC gets its funding from "some of the EB-5 investors and from Tony and Herminia."

she invested no money in Citizens Group, Richman, or One Investments, and has received no profits from them. The court found they had no value.

At trial, David argued Yvonne "misappropriated money from the community, hid it in accounts held in joint tenancy with her mother, and used it to buy property for herself shortly after separation and perhaps even during marriage." Thus, much of the testimony at trial concerned whether monies deposited into the joint accounts and paid from those accounts to make post-separation investments, including to purchase the Hellman property, originated from the community.

David also argued Yvonne breached her fiduciary duties to him under the Family Code by transferring community property assets in her control without telling him and by failing to disclose her post-separation financial transactions and ownership of the companies she formed post-separation.

Yvonne in turn argued the monies in the joint accounts belonged entirely to Herminia, the Hellman project was Herminia's investment, and any monies transferred from the community had been reinstated. Yvonne contended David breached his fiduciary duties when he repaid a $70,000 loan from his father before the couple separated without telling Yvonne or getting her consent.

After hearing the evidence and argument of counsel, the court gave an oral statement of decision. The court bifurcated the issues of attorney fees, costs, and sanctions and tried those issues by declarations and argument in March and April 2018. The judgment on reserved issues, entered September 11, 2018, incorporated the court's earlier oral statement of decision and rulings on the attorney fees and sanctions issues.

The portions of that judgment relevant to this appeal provide:

1. The joint Yvonne/Herminia accounts and the investment companies and assets Yvonne formed and acquired post-separation are Yvonne's separate property;

2. Yvonne is to pay David $56,125.93, one-half the value of the community detriment Yvonne caused when she transferred securities from the community in 2004/2005 in breach of her fiduciary duties;

3. Yvonne is to pay David $22,000 in attorney fees as sanctions under section 271 relating to her failure to disclose information as required by the Family Code;

4. David is to pay Yvonne $18,029.30 in attorney fees and costs under sections 721 and 1101 for breaching his fiduciary duties by failing to disclose he had borrowed from and repaid his father $70,000 with community funds.

David filed a timely notice of appeal.

DISCUSSION

David challenges four of the court's orders incorporated into the judgment on reserved issues. He argues the court (1) should not have awarded attorney fees and costs to Yvonne under section 1101 for David's breach of fiduciary duties because Yvonne's interest in the community estate was not impaired; (2) incorrectly valued the securities it found Yvonne transferred in breach of her fiduciary duty when making its award to David under section 1101(g); (3) erroneously concluded David failed to properly move for sanctions under section 2107, subdivision (c) for Yvonne's failure to disclose financial information; and (4) improperly characterized as Yvonne's separate property her interest in the joint Yvonne/Herminia accounts and assets purchased with funds from those accounts.

1. *Standards of review*

We review a trial court's award of attorney fees and sanctions for abuse of discretion. (*In re Marriage of Schleich* (2017) 8 Cal.App.5th 267, 276.) " 'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "We review any findings of fact that formed the basis for the award . . . under a substantial evidence standard of review." (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1479 (*Feldman*).)

In general, we review a trial court's finding that a particular asset is separate or community property for substantial evidence. (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 849.) We also review for substantial evidence findings relating to a claim of a spouse's breach of fiduciary duty. (*In re Marriage of Ciprari* (2019) 32 Cal.App.5th 83, 102 (*Ciprari*).)

"When reviewing for substantial evidence, 'all conflicts must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences must be indulged in order to uphold the trial court's finding. [Citation.] In that regard, it is well established that the trial court weighs the evidence and determines issues of credibility and these determinations and assessments are binding and conclusive on the appellate court.' " (*In re Marriage of Berman* (2017) 15 Cal.App.5th 914, 920.) Reversal is not justified based on " ' "testimony which is subject to justifiable suspicion." ' " (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.) We may only reject testimony that is " ' "unbelievable *per se*." ' " (*Ibid.*)

"[T]o the extent the trial court's decision reflects an interpretation of a statute, it presents a question of law that we review de novo." (*In re Marriage of Dellaria & Blickman-Dellaria*

(2009) 172 Cal.App.4th 196, 201; *Feldman, supra*, 153 Cal.App.4th at p. 1479.)

2. *The court erred when it awarded Yvonne attorney fees under section 1101(g) for David's breach of fiduciary duty that did not damage the community*

Section 1101, subdivision (a) provides for a claim by one spouse "against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate." Section 1101(g) in turn states the "[r]emedies for breach of the fiduciary duty by one spouse, including those set out in [s]ections 721 and 1100, shall include . . . an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs."

Yvonne asked the court to award her attorney fees and costs she incurred due to David's breach of fiduciary duty under *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336 (*Fossum*) and sections 721 and 1101(g). At trial, David presented evidence he borrowed $70,000 in two installments from his father to pay for community expenses. He then paid his father back the $70,000 the month before he and Yvonne separated, but did not tell Yvonne. Yvonne argued she incurred fees and costs to trace the $70,000, which David at one point said was a gift, and to try the issue.

The court found David encumbered the community in the amount of $70,000 in breach of his fiduciary duty, but there was "insufficient evidence as to the damage." Nevertheless, the court

concluded it was required to award fees "as appropriate" for the breach of fiduciary duty under sections 721 and 1101, and *Fossum*. It awarded Yvonne $18,029.30.

David contends Yvonne was not entitled to attorney fees under section 1101(g) based on the $70,000 transaction between him and his father because the transaction did not impair Yvonne's interest in the community estate. We agree.

A divided court of appeal in *Fossum* held a trial court lacked discretion to deny a request for attorney fees under section 1101(g) "[o]nce a breach [was] shown." (*Fossum, supra*, 192 Cal.App.4th at p. 348.) There, however, the trial court had awarded the husband 50 percent of the wife's undisclosed credit card debt incurred during the marriage, but denied the husband attorney fees. (*Id.* at p. 347.)

Statutory interpretation begins with " 'the words of the statute,' " and if those words are clear and unambiguous, it ends there. (*Fossum, supra*, 192 Cal.App.4th at pp. 347-348.) The unambiguous language of section 1101, subdivision (a) allows a claim for breach of fiduciary duty only if the breach causes an "impairment" to the claimant spouse's existing one-half interest in community property. We therefore read *Fossum* as holding attorney fees mandatory any time a breach of fiduciary duty that "results in impairment" to the claimant's half of the community estate under section 1101, subdivision (a) has been proved.

In contrast to *Fossum*, the trial court here did not award Yvonne 50 percent of the undisclosed $70,000 transaction it found constituted a breach of fiduciary duty. Because David's breach of fiduciary duty did not "result[ ] in impairment to [Yvonne's] present undivided one-half interest in the community estate," no claim, and thus no remedy—including attorney fees—was available to Yvonne for this transaction under section 1101, subdivision (a).

Again, the plain language of the statute supports this interpretation. Subdivision (g) is a remedy provision. The breach referenced in it cannot be different from the breach referenced in subdivision (a), which allows a claim for the breach in the first place.[6] The two subdivisions must be read together as allowing a claim and a remedy only for a breach that impairs the complaining spouse's present half-interest in community property. (*Los Angeles Unified School Dist. v. Garcia* (2013) 58 Cal.4th 175, 193 [statutory provisions must be read together rather than in isolation].) If any breach of fiduciary duty, whether causing harm or not, led to the remedies outlined by subdivision (g), then the inclusion of the language "results in impairment . . ." in subdivision (a) would be superfluous.

Moreover, the language of subdivision (g) makes clear the remedy of attorney fees is tied to the court's award of 50 percent, or an amount equal to 50 percent, of the value of the transferred or undisclosed asset. The statute does not provide for 50 percent

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[6] Subdivision (g) includes breaches of fiduciary duties under sections 721 and 1100 as those remediable under the statute. A spouse may breach his or her fiduciary duties under those sections even if no damage occurs. Section 1100, for example, requires a spouse to obtain consent from the other spouse before disposing of or encumbering community personal property and to disclose information about assets and debts in or for which the community may have an interest or be liable. (§ 1100, subds. (b), (c) & (e).) Section 721, among other things, requires spouses to account for any profit derived from any transaction without the other's consent that involves community property. (§ 721, subd. (b)(3).) However, even if a spouse may show a breach of fiduciary duty without having to prove damages, no claim or remedy for that breach is available under section 1101 by its own terms unless the breach detrimentally affected the complaining spouse's interest in the community estate.

of the asset, attorney fees, or both, but 50 percent of the asset *plus* attorney fees and costs. Had the Legislature intended for attorney fees to be a separate, independent remedy under this section it would have said so. Here, of course, the trial court never found Yvonne was entitled to 50 percent of the $70,000 precisely because it concluded the transaction did not impair her one-half community property interest.

Although David may have breached his fiduciary duty by either failing to disclose the transaction or engaging in the transaction without Yvonne's consent, Yvonne could not succeed on a claim for that breach of fiduciary duty under section 1101, subdivision (a) because the transaction did not impair her community property interest. Because she cannot make a claim under section 1101, logically she is not eligible for the remedies provided by section 1101(g), including attorney fees.[7] We thus conclude the trial court read *Fossum* too broadly in finding attorney fees mandatory despite a lack of damage to Yvonne's interest in the community estate from David's breach.

We reverse the trial court's award of attorney fees and costs to Yvonne under section 1101(g) in connection with its finding

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[7] A complaining spouse is not without recourse if the other spouse breaches a fiduciary duty without harming her community property interest, however. For instance, sections 271 (sanctions in the form of attorney fees recoverable for conduct impairing settlement) and 2107, subdivision (c) (mandatory sanctions and attorney fees awarded for failure to disclose financial information) do not require proof of harm. (*Feldman*, *supra*, 153 Cal.App.4th at pp. 1478, fn. 6, 1479-1480 [upholding award of sanctions and attorney fees under sections 271 and 2107 where no harm shown, but declining to decide whether section 1101(g) also would support the award of attorney fees].)

that David's conduct surrounding the $70,000 transaction was a breach of fiduciary duty.

3. *The court erred in calculating the amount Yvonne owed David under section 1101(g)*

The court concluded the evidence supported only one breach of fiduciary duty by Yvonne pre-separation: when she transferred community property securities from an account in her name to one of the joint Yvonne/Herminia accounts in 2004 and then back to an account in her own name in 2005.

Yvonne testified she transferred 11 securities worth $190,979.23 in total from her individual account in July 2004 to an account she held jointly with Herminia. In August 2005, Yvonne transferred the 11 securities and others from the joint account to an E-Trade account in her own name. By then, the 11 securities were worth $218,570.32 in total. Yvonne's and David's joint tax return for 2006, received into evidence, shows three of the 11 securities were sold for a total of $106,318.46. The court concluded Yvonne breached her fiduciary duties by transferring the community property securities to the joint account entitling David to damages.

Yvonne's counsel argued the court should exclude the value of these three securities from its calculation of the amount Yvonne owed David under section 1101(g) because the community received the proceeds from their sale and therefore was not damaged when Yvonne transferred them. Yvonne's counsel argued the court should "charge" Yvonne with 50 percent of the transferred securities she could not trace back to the community by deducting the $106,318.46 realized by the community from the $218,570.32 total value of the transferred securities.

The court accepted Yvonne's counsel's formula for calculating the amount of damages Yvonne owed David. It took

the $218,570.32 value of the 11 securities on the August 2005 transfer date—which was higher than their value on the July 2004 transfer date—deducted the $106,318.46 realized by the community from the three that were sold, and awarded 50 percent of the $112,251.86 balance, $56,125.93, to David.

David contends the court erred when it deducted the value of the three sold securities from the value of the 11 transferred securities and when it valued the 11 securities at their total value in August 2005. David contends the court should have viewed each separate security as an individual asset and chosen the highest value of each security to determine his damages, including the three sold. We conclude the court properly excluded the value of the three securities sold for the community's benefit from its damages calculus, but agree the court erred in how it valued the remaining securities and calculated David's damages.

As we have discussed, and David himself argues, a claim for breach of fiduciary duty under section 1101 requires that the breach impair the claimant spouse's interest in the community estate. Yvonne's transfer of the three securities did not harm David's one-half interest in the community estate. The couple's 2006 joint tax return provides substantial evidence the community realized the proceeds from their sale and thus supports the court's finding Yvonne's transfer of those three securities did not detrimentally affect the community. Had Yvonne transferred only those three securities in breach of her fiduciary duty, David would not have been entitled to damages under section 1101(g), just as David argues Yvonne was not entitled to attorney fees under that statute for his breach of fiduciary duty that caused no damage to the community. Therefore, the court properly excluded these three securities in determining David's damages under section 1101(g).

The court nevertheless erred when it calculated the value of the transferred securities by looking at their total value in August 2005 and *deducting* the sales proceeds of the three securities rather than *excluding* their value from the total. The language of the statute is unambiguous. Section 1101 includes as a remedy an award of "an amount equal to 50 percent[ ] of *any asset* undisclosed or transferred in breach of the fiduciary duty." (§ 1101(g), italics added.) In our view, each individual security is an asset. While the breach of fiduciary duty may be based on "a single transaction or a pattern or series of transactions" that "cause a detrimental impact" to the community estate, nothing in the statute requires the court to assign one value to multiple assets that are part of the same transaction when each asset can be individually valued. (§ 1101, subd. (a).) Rather, the statute *requires* the court to assess the value of "any" transferred asset at "its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court." (§ 1101(g))

The court did not look at each security or asset individually but considered the highest value of the securities as a group. In certain circumstances, that may be the only way to determine the highest value of a group of assets involved in a single transaction. But here the court could ascertain the value of each individual security at the time each was transferred in both 2004 and 2005.[8] The court also was able to assign individual values to the three securities sold as community assets to reach the $106,318.46 total it deducted. Presumably, if Yvonne had transferred each individual security on separate days, the court would have had

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[8] Both dates are dates on which Yvonne breached her fiduciary duty. David does not contend any security's highest value is the date of the court's award.

to determine the highest value of each individual security, rather than totaling the value of all securities transferred on one day, as it did here.

The court's error in lumping the securities together to determine their value was not harmless. Excluding the three securities that were sold, four of the eight unaccounted for securities were worth more in 2004 when Yvonne first transferred them than they were in 2005, the date on which the court valued them. Moreover, the court included the August 2005 value of three sold securities in the total and then deducted their value at sale, which was different from their 2005 value. Instead, the court should not have counted those three securities in the total at all. Their transfer did not detrimentally affect the community and should not have been part of the damages analysis. Rather, the court should have determined the highest value of each of the eight unaccounted for securities, totaled those eight values, and awarded David 50 percent of that total. On remand, the court is to choose the highest value for each of the eight unaccounted for securities—whether that be at the 2004 or 2005 breach date.[9] David is entitled to 50 percent of the value of that new total under section 1101(g).

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[9] Based on our review of the record, it appears the highest values of the eight securities not included in the 2006 tax return are: China Life Insurance Co. Ltd., $15,975 in 2005; Citigroup, $8,780 in 2004; Comparator Systems Corp. New, $10 in 2004; General Electric Co., $23,947 in 2005; Goldman Sachs Group, Inc., $34,401 in 2005; Lucent Technologies, Inc., $6,160 in 2004; Wal-Mart Stores, Inc., $10,780 in 2004; and Tiers Principal Protected S&P, $33,000 in 2005.

4. *The court erred when it did not consider David's request for sanctions under section 2107*

David sought $300,000 in sanctions under section 2107, subdivision (c) based on Yvonne's failure to disclose assets and financial transactions as required by statute. He also sought attorney fees and costs as sanctions under section 271 on the ground Yvonne frustrated the policy of the law to promote equal division of assets and settlement and to reduce litigation costs through her failure to disclose her assets and post-separation financial transactions, and her conflicting deposition and trial testimony about them.

At the bifurcated hearing on attorney fees, however, the court concluded David's request under section 2107, subdivision (c) "is a type of motion that must be brought." The court "believe[ed] that procedurally this issue was not properly, if you will, noticed and prepared and presented to the court." Instead, the court found section 271 was "the appropriate avenue for [David's] fees and costs" relating to his contention Yvonne's conduct caused him to have to "chase around and follow things and find things unnecessarily." The court then denied a "direct" award of fees under section 2107 "because it was not procedurally done properly." The court nevertheless concluded Yvonne's conduct "did violate [section] 2107, the case law, and prevented settlement from happening. So [the court] assess[ed] it in the light of ordering it as a section 271 sanction."

We are not entirely clear what the court meant when it said David did not bring a procedurally proper motion under section 2107. The court and the parties agreed to bifurcate the issues of attorney fees and sanctions. The court expressly stated the trial on the reserved issues of attorney fees, costs, and sanctions would include "all claims for attorney[ ] fees and costs for sanctions for failure to disclose or fully disclose under the

mandatory disclosure statutes[,] *specifically Family Code [section] 2107(c)*." (Italics added.) The court set a briefing schedule for the parties' fees and sanctions requests. It ordered Yvonne to file her affirmative request for attorney fees and sanctions first and told David's counsel she could file David's "own separate affirmative requests" on the same day his opposition to Yvonne's moving papers was due. The court also told David he did not need to file his affirmative request as a formal request for order or to pay a separate filing fee.

The parties filed their affirmative requests and opposing papers as ordered by the court,[10] and David specifically asked for sanctions under section 2107, subdivision (c) in his request for attorney fees, costs, and sanctions. He thus "brought" the motion as ordered by the court. We do not see why David's request for sanctions under section 2107 would be defective when his requests for attorney fees under section 1101 and sanctions under 271, made in the same filing, were not. We only can conclude, as David has, the court was referring to the fact David did not first move the court for the remedies available under section 2107, subdivision (b).

If a party fails to serve the other party with a preliminary or final declaration of disclosure as required by sections 2104 and 2105, or fails to provide the information required by those declarations with "sufficient particularity," the complying party may "request preparation of the appropriate declaration of

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[10] It appears David may have filed his opposition to Yvonne's request for fees and sanctions and his affirmative request for fees and sanctions one day late. The court did not mention the late filing as a basis for finding the motion improper, nor does the record show Yvonne raised the issue. And as we have said, the court considered David's affirmative request in all other respects.

disclosure or further particularity." (§ 2107, subd. (a).) If the noncomplying party fails to heed a request made under subdivision (a), the complying party "may" file a motion to compel further response or file a motion for an order preventing the offending party from presenting evidence on the issues that should have been covered in the disclosures. (§ 2107, subd. (b).)

The parties here filed their preliminary and final declarations of disclosure. David therefore did not make a request under section 2107, subdivision (a) or file a motion under subdivision (b). Rather, he discovered Yvonne failed to disclose certain financial accounts and transactions in discovery and at trial. Section 2107, subdivision (c) independently states that "[i]f a party fails to comply with any provision of this chapter [sections 2100 to 2113],[11] the court shall, in addition to any other remedy provided by law, impose money sanctions against the noncomplying party."

As stated in *Feldman*, "The terms of the statute simply do not require that before seeking sanctions for nondisclosure a party (1) seek further disclosure and (2) bring a motion to either compel further responses or preclude evidence." (*Feldman, supra*, 153 Cal.App.4th at p. 1481 [finding sanctions available to wife "despite the fact that [she] did not avail herself of the remedies set forth in subdivisions (a) and (b) of section 2107"].) We agree. The language in subdivisions (a) and (b) of section

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[11] These sections require the parties to make financial disclosures. Section 2100, for example, requires parties to make "a full and accurate disclosure of all assets and liabilities . . . regardless of the characterization as community or separate" and to update that disclosure with material changes. (§ 2100, subd. (c); see also § 2102, subd. (a)(1) [parties must disclose all assets and liabilities in which she "has or may have an interest or obligation"].)

2107 is permissive. A complying party *may* seek those remedies. The sanctions available under subdivision (c) of the statute are *in addition to any other remedy*. David thus was entitled to move for sanctions under section 2107, subdivision (c) without first making a motion under subdivision (b).

The question is whether David was prejudiced by the court's summary denial of his request for sanctions under section 2107 when it awarded him $22,000 in attorney fees under section 271 based on the same conduct. David would not have been able to recover those same attorney fees twice. David notes sanctions under section 2107, subdivision (c) are mandatory and the two statutes have different goals. Under section 2107, subdivision (c), if a party fails to comply with the statutorily mandated disclosure requirements, the court "*shall* . . . impose money sanctions against the noncomplying party." (Italics added.) Those sanctions "*shall* be in an amount sufficient to deter repetition of the conduct or comparable conduct, and *shall* include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (*Ibid*., italics added.) Based on the plain language of the statute, David appears to contend the court would have awarded him monetary sanctions *in addition to* the $22,000 in attorney fees he received under section 271 had it considered his request for sanctions under section 2107.

Because we do not know whether (1) the court would have awarded David sanctions under section 2107, subdivision (c) at all, or (2) if it had granted David's request, whether it would have awarded him more than $22,000, we remand the matter for the court to consider David's request.

5. *Substantial evidence supports the trial court's characterization of Yvonne's separate property*

David challenges the court's finding that Yvonne's separate property included: (1) the joint Yvonne/Herminia accounts that existed during the marriage, and (2) the companies Yvonne formed post-separation and their related investments.[12] He asks us to vacate the trial court's order and award Yvonne her community interest in the joint accounts and 50 percent of the three Hellman project companies, 50 percent of One Investments, and one-half of the $761,436 "return on the Hellman Investment," all of which he contends is community property.[13] He argues there was no evidence the joint accounts held any separate property that belonged to Yvonne or that Yvonne had any separate property to make the post-separation investments.

Substantial evidence supports the court's finding that Yvonne demonstrated the accounts and post-separation financial transactions did not include community property.

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[12] The court confirmed as Yvonne's separate property the three Hellman project companies: Hellman LLC, Citizens Group, and Richman. David also contends Yvonne's investment in One Investments is part of the community. The court did not specifically identify that company in its judgment. Yvonne testified she did not personally invest in it. We can infer the court treated it, like the other post-separation companies, as Yvonne's separate property interest with no value or belonging entirely to a third party.

[13] The court also confirmed two investment projects, GEM 101 and GEM 102, as Yvonne's separate property at no value. David characterizes the two investments as community property, but asks that we award them to Yvonne in their entirety. The GEM 102 fund closed with no value. Herminia invested in GEM 101 with funds from one of the joint accounts.

a. *Applicable law*

Property acquired during the marriage is presumed to be community property under section 760, while property acquired before marriage or after separation or at any time by gift is separate property. (*Ciprari, supra*, 32 Cal.App.5th at p. 91.) " 'Thus, there is a general presumption that property acquired during marriage by either spouse other than by gift or inheritance is community property unless traceable to a separate property source. [Citation.] This is a rebuttable presumption affecting the burden of proof; hence it can be overcome by the party contesting community property status. [Citation.] Since this general community property presumption is not a title presumption, virtually any credible evidence may be used to overcome it, including tracing the asset to a separate property source.' " (*Ibid.*) " '[I]f the separate property and community property interests have been commingled in such a manner that the respective contributions cannot be traced and identified, the entire commingled funds will be deemed community property pursuant to the general community property presumption of section 760.' " (*Id.* at pp. 91-92.)

Funds paid out of a commingled account also are presumed to be community funds. (*Ciprari, supra*, 32 Cal.App.5th at p. 94.) " ' "In order to overcome this presumption, a party must trace the funds expended to a separate property source." ' " (*Ibid.*) " ' "The finding of a trial court that property is either separate or community in character is binding and conclusive on the appellate court if it is supported by sufficient evidence, or if it is based on conflicting evidence or upon evidence that is subject to different inferences." ' " (*Estate of Leslie* (1984) 37 Cal.3d 186, 201; see also *In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 734.)

Finally, the duty of a managing spouse "to account for the disposition of community property exists from separation to final distribution of assets." (*In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252, 1280 (*Margulis*).) Thus, when one spouse exclusively controls community property after separation, he or she has the burden of proof to account for missing community assets to the nonmanaging spouse upon a prima facie showing that assets have disappeared while under his or her control. (*Id.* at pp. 1257-1258, 1267.)

b. *Substantial evidence supports the court's finding that the community did not have an interest in the joint Yvonne/Herminia accounts*

We first address David's apparent contention that the monies in the joint Yvonne/Herminia accounts—and correspondingly, any post-separation investments made with those funds—could have come only from community property because there is no evidence the joint accounts held any of Yvonne's separate property or Yvonne had any separate property unrelated to her earnings[14] on the date of separation. In essence, he argues there is insufficient evidence to establish the joint accounts contained Yvonne's separate property and thus they should be characterized based on the presumptions under section 760.

We do not interpret the court's separate property characterization of the joint accounts and post-separation investments as finding Yvonne funded them with her separate property. During the parties' opening statements, the court

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[14] Yvonne deposited her income into her individual financial accounts. Income earned during marriage is community property, while post-separation earnings are separate property. (*In re Marriage of Harrison* (1986) 179 Cal.App.3d 1216, 1226.)

explained that, for purposes of characterization, it could identify and characterize Yvonne's interest in the joint accounts as "her sole and separate property," meaning "one-half or whatever the interest jointly is with her mother." After hearing the evidence, that is what the court did. We conclude Yvonne need not have funded those accounts with her separate property for the court to find her interest in them her separate property. As we will discuss, the court found Yvonne did not misappropriate community funds and implicitly found the joint accounts were funded by Herminia. Yvonne's interest as a joint owner of financial accounts (or investments) her mother funded is her separate property interest. Moreover, the court concluded Yvonne traced any co-mingling of community monies into the joint accounts and demonstrated those funds were returned to the community.[15]

In other words, having concluded the funds in the joint Yvonne/Herminia accounts did not come from the community (or were returned to the community)—and therefore no investments made with those funds belonged to the community—whatever interest Yvonne had in the joint accounts and post-separation investments were properly characterized as her separate property interest.

We turn next to David's argument that Yvonne failed to rebut the presumption that her interest in the joint accounts belonged to the community. (*Ciprari, supra*, 32 Cal.App.5th at p. 91.) David argues there is no evidence "Herminia's assets were ever in any of the joint tenancy accounts," and Yvonne produced no documents to prove the source of the "starting balances" of the joint accounts. Accordingly, David contends the court must

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[15] The only exception were the securities Yvonne transferred to the community's detriment in 2004 and 2005.

presume these joint accounts, that Yvonne took title to during marriage, contained community funds.

Substantial evidence supports the court's finding Yvonne proved the joint accounts were not funded by the community. Yvonne may not have produced bank records showing the original deposits into the joint accounts,[16] but Herminia and her sister-in-law Robyn Hu testified extensively about the original source of those funds. They were funded with money Herminia inherited when her husband died in Hong Kong in 1987. She kept that savings—worth $700,000 by late 1996—in Hong Kong bank accounts she held jointly with Robyn until Robyn turned the accounts over to Herminia in 1998. Herminia gradually wired the funds to her U.S. bank accounts. Herminia received an additional $300,000 in 2000 from the sale of property she owned in Shanghai and about $250,000 from the 2001 sale of real property she owned in San Francisco.

Jack Zuckerman—Yvonne's expert accountant who performed a bank tracing and analysis—presumed the beginning balances from three of the joint accounts he traced came from these assets. David appears to contend Zukerman's analysis that the accounts contained no community property funds—deposits from accounts Yvonne held individually or Yvonne and David held jointly[17]—is suspect because Zuckerman had no personal knowledge of and did not trace the origins of the money in the joint accounts. We can infer the court found Herminia and Robyn

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[16] Yvonne testified she was added to the accounts 10 or more years before the trial date.

[17] Zuckerman construed community sources as deposits from accounts existing before separation in Yvonne's name alone or Yvonne's and David's name jointly.

credible. "A single witness's testimony may constitute substantial evidence to support a finding." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.) The absence of documentation thus "goes to the weight of the evidence and the credibility of the witness[es]. Those determinations are for the [fact finder]." (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767-768.) Accordingly, the evidence supports the court's implicit finding the original funding for the joint accounts came from Herminia's property, not the community.

As he did at trial, David questions Herminia's and Yvonne's true motivation behind naming Yvonne as a joint owner on Herminia's accounts. He argues "[i]t is inconceivable that Yvonne actually believe[d] she must be on title to assets owned by Herminia to help her with her investments, even if her mother does not speak English well." But Yvonne never testified she believed she had to do so. On cross-examination, she agreed she was not required to be named on an account in order to make investments for her clients. She did so because this was her mother, not an average client. She testified that her client—her mother—directed her to become a joint owner.

Yvonne said her name was added to the accounts in the last 10 years. Herminia testified consistently. She said she added Yvonne's name to some of the accounts after she had opened them and jointly opened others. Herminia explained she held the accounts with Yvonne because she wanted Yvonne to help her manage them. Herminia speaks Cantonese.[18] Yvonne also testified her name was on the accounts "for convenience of helping [Herminia] to manage her own asset[s]." She testified her mother was worried about her health. With her name on

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[18] Herminia required a Cantonese interpreter at trial.

the accounts, Yvonne could pay her mother's expenses from them if her mother became ill. In discovery, Yvonne declared the accounts were titled jointly so they would "automatically pass" to Yvonne on Herminia's death.

David nevertheless contends Yvonne treated the accounts as if she owned the money. For example, with respect to the 2004/2005 securities transfer, David presented evidence Yvonne transferred three mutual funds from the joint account at the same time she transferred the community securities to her E-Trade account.[19] David argues Yvonne's transfer of Herminia's assets to Yvonne's account is inconsistent with the testimony the assets in the joint accounts belonged to Herminia, not Yvonne. But Yvonne testified that, if she had made that mistake, as an E-Trade branch manager she would have been able to transfer the funds back. She could not recall what happened. The court heard the evidence and considered David's argument. We infer it did not draw the same adverse inferences from Yvonne's conduct as David does.

Having implicitly found the joint accounts contained no community funds to begin with, the court also concluded Yvonne "accounted for the monies that went out, monies that were misdirected, [and] monies that were mixed or commingled with" the joint Yvonne/Herminia accounts, except for the 2004/2005 securities transactions. The court ruled Yvonne "adequately

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[19] David also notes Yvonne did not produce any statements from her E-trade account and testified at her deposition she did not transfer community securities into accounts she owned with her mother. Yvonne testified those bank records were not available because they were more than seven years old and acknowledged her earlier testimony. Nevertheless, as we discussed, the court awarded David half the value of the transferred securities.

traced, adequately provided proof of pre-separation transactions where money went out from the community and money was put back into the community," and "there was insufficient proof of loss to the community as the result of those transactions." Other than the securities transactions the court mentioned (and awarded half to David under section 1101(g)), it found Yvonne demonstrated she returned to the community any community funds she had moved into accounts co-owned with Herminia. Substantial evidence supports the court's conclusion. Yvonne traced her pre-separation transfers of community property—namely the 2004/2005 securities—into and back out of the joint account through her testimony and bank records.

As he did at trial, David contends Herminia's, Robyn's, and Yvonne's testimony cannot be believed. We disagree. We do not find it unbelievable that Herminia, who speaks Cantonese and little English, would want her accounts and investments held in her daughter's name. After all, Yvonne is a licensed financial broker and advisor. We can infer the court found Yvonne's and Herminia's explanation reasonable; it was entitled to rely on their testimony. We will not reweigh the evidence or disturb the trial court's credibility determinations. (*In re Marriage of Berman, supra*, 15 Cal.App.5th at p. 920.) Viewing the evidence in the light most favorable to Yvonne, we conclude substantial evidence supports the trial court's finding the community did not have an interest in the joint accounts, and by extension no interest in investments made with those funds.

c. *Substantial evidence supports the court's characterization of the post-separation investments as Yvonne's separate property*

The court found and the evidence shows Yvonne formed Hellman LLC and the other companies after the date of separation. They thus are presumed to be Yvonne's separate

property. (*Ciprari, supra*, 32 Cal.App.5th at p. 91.) It is undisputed David had no access to Yvonne's individual financial accounts during the marriage. Yvonne controlled those funds and the investments she made with them. David presented evidence and argued Yvonne misused community funds to make the various post-separation investments, shifting the burden to Yvonne under *Margulis* to demonstrate otherwise. (*Margulis, supra*, 198 Cal.App.4th at pp. 1267, 1274.) He contends the investments—held in Yvonne's name—presumably must have been made with community funds because she had no separate property to fund them.

The court expressly found, "the evidence presented by Yvonne to be more persuasive than the evidence presented by David at trial as to the analysis of separate property transactions." The court found Zuckerman's bank tracing analysis to be more thorough and persuasive than David's expert's tracing—"[i]t accounted for assets going out and assets coming back." The court concluded Yvonne had accounted for "every penny post-separation" and met her burden under *Margulis* to show no community funds were missing. In other words, the court rejected David's theory Yvonne misappropriated community funds—hiding them in the joint Yvonne/Herminia accounts—to make the Hellman and other investments.[20]

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[20] The court did find Yvonne failed to adequately disclose her interests in the joint accounts and post-separation transactions as required by the Family Code, but the lack of disclosure had no "adverse consequence" on the community. We note David refers to Yvonne's lack of disclosure about her financial transactions throughout his argument to imply the investments really were hers rather than Herminia's. But David was not entitled to a community interest in the nondisclosed assets simply because they were not disclosed. He was not without a remedy for this

Substantial evidence supports the court's findings. Yvonne and Herminia testified at length about the nature and source of the Hellman investment (and other post-separation investments). Herminia and Tony Zeng formed a partnership to purchase the Hellman property. Yvonne was named as the co-owner of Hellman LLC and took title to the Hellman property instead of Herminia due to Herminia's age and inability to read and understand English. Yvonne and Herminia agreed Yvonne would have no ownership interest in the investment and all profits and losses were Herminia's responsibility.[21] Herminia "hired [Yvonne] as her agent" to take care of the investment and "handle[ ] everything" for her.

As for the funding of the property purchase, of the $800,000 Herminia agreed to invest, she borrowed $254,303 from Yvonne, and Yvonne gave Tony a promissory note for $184,000 on Herminia's behalf. Herminia testified she was responsible for the note's repayment. Herminia and Yvonne signed a loan agreement for the $254,303.[22]

Zuckerman traced through bank records the movement of funds post-separation between Yvonne's individual account(s), the joint Yvonne/Herminia account(s), and Hellman LLC's account. He prepared a summary of transactions from the bank records. He also analyzed the source of Hellman LLC's

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transgression, however. The court ruled he could move to recover his attorney fees and costs incurred due to Yvonne's inadequate disclosures. He did.

[21] They signed a memorandum of understanding to this effect dated August 2015 that the court received into evidence.

[22] The court received the agreement, dated August 2015, into evidence.

acquisition of the Hellman property in August 2015 for $2,092,500. The evidence shows Yvonne wired $254,303 from one of her individual accounts into the Hellman property escrow account.[23] Yvonne also presented evidence Herminia repaid the $254,303 in May and December 2016 through checks written from one of the joint Yvonne/Herminia accounts. Yvonne deposited them into her individual account. Yvonne took title to the Hellman property at the time of purchase but granted it to Hellman LLC a few days later.

Zuckerman's analysis also shows Hellman LLC received almost $2 million total from an escrow account in December 2015 and February 2016. He believed the deposits were a return on the Hellman investment. Yvonne paid herself[24] a total of $761,436 from the Hellman LLC account that she deposited into a joint Yvonne/Herminia account. She testified the $761,436 payment was not a return on the Hellman investment, but from a loan EB-5 investors made to Herminia and Zeng for the Hellman property purchase.[25]

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[23] The analysis shows the remaining escrow funds came from deposits Yvonne made from the joint Yvonne/Herminia account—an initial $100,00 deposit in November 2014 and a $395,697 deposit in August 2015—and deposits made from the Hellman LLC bank account, Zeng, and his sister. (The bank records also show deposits from the joint account to Hellman LLC generally, ranging from $9,000 to $60,000.)

[24] Yvonne is a signatory on the Hellman LLC account.

[25] David contends the $761,436 is community property because Yvonne invested in the property. He attempted to impeach Yvonne's testimony by introducing a federal regulation that "invest" does not mean contributing capital in exchange for a note or other obligations for EB-5 purposes. (8 C.F.R. § 204.6(e).) Because we conclude the court did not err in its characterization

From that amount, $284,000 was paid from the joint account into an escrow in March 2016 as the initial deposit for the purchase of a property by One Investments, in which Yvonne was a partner. Yvonne also lent Herminia $225,000 for the purchase and development of that property under a second loan agreement dated August 2016.[26] She wired the $225,000 from her individual account into the joint account. The evidence shows Herminia repaid the $225,000 in December 2016 through a check written from the same joint account and deposited into Yvonne's individual account. That sale fell through and Yvonne personally spent $102,000 in attorney fees to try to recover her mother's deposit.

After walking the court through the various deposits, withdrawals, and transfers, Zuckerman testified he did not see "any commingling, per se" in the accounts he traced "from purely community sources in which [David] had an interest other than the loans." As to the loans, the evidence discussed shows the funds were returned to the community.

As he did at trial, David points out contradictions in and draws adverse inferences from the evidence to argue it is insufficient to support finding Herminia funded the post-separation investments. We have reviewed the record and David's brief. David's argument rehashes the evidence presented at trial and essentially calls into question the court's implicit credibility findings. But under the substantial evidence standard of review, the "issue is not whether there is evidence in the record to support a different finding, but whether there is some evidence

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of the Hellman investment, we find it insignificant whether the $761,436 was a loan, a return on Herminia's investment, or something else.

[26] The court also received this agreement into evidence.

that, if believed, would support the findings of the trier of fact." (*Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 170-171.) We can infer the trial court weighed the contradictory evidence David presented and found the women's testimony about the investments credible and their agreements genuine.

We thus will not reweigh the evidence and do not question the court's credibility findings. Although reasonable jurists may disagree, as with the joint accounts, the trial court reasonably could conclude Herminia would want Yvonne, an investment savvy, licensed broker, to handle her investments by putting them into her own name. Zuckerman also credibly traced with financial records the deposits and transfers into and from the accounts in issue and demonstrated the funds Yvonne transferred from her individual accounts were returned with no loss to the community. Substantial evidence supports the trial court's characterization of Yvonne's separate property interests.

DISPOSITION

The September 11, 2018 judgment on reserved issues is reversed in part and remanded as follows: (1) We reverse the court's award of $18,029.30 in attorney fees and costs to Yvonne to be paid by David; (2) We reverse the award of $56,125.93 to David as damages for Yvonne's breach of fiduciary duties under section 1101(g) and remand to the trial court to recalculate David's damages consistent with this opinion; and (3) We reverse the trial court's summary denial of David's motion for sanctions under section 2107 and, without opining on the outcome, direct

the court to consider David's motion on remand. The judgment is affirmed in all other respects. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, Acting P. J.

We concur:

DHANIDINA, J.

EPSTEIN, J.*

* Retired Presiding Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.